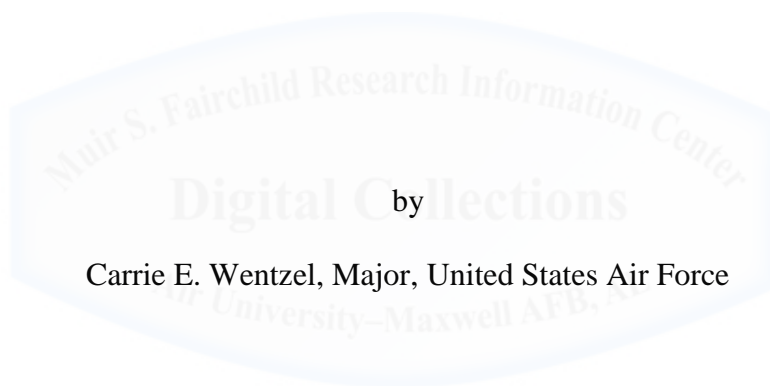


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AIR COMMAND AND STAFF COLLEGE

AIR UNIVERSITY

**ESTABLISHING SENTENCING GUIDELINES
FOR MILITARY COURTS-MARTIAL**



by

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A Research Report Submitted to the Faculty

In Partial Fulfillment of the Graduation Requirements for the Degree of

MASTER OF OPERATIONAL ARTS AND SCIENCES

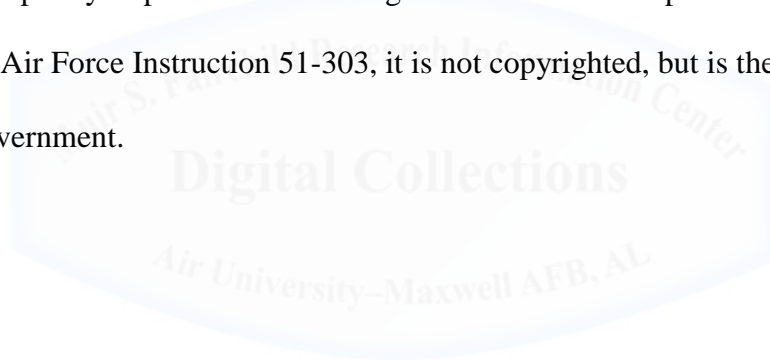
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The debate over the adequacy of the military's sentencing procedures is not new. It has been a contentious issue since the first Manual for Courts-Martial (MCM) was published in 1951. Recent negative attention on the military's handling of sexual assault cases has brought the military justice system once again under scrutiny and rekindled arguments for mandatory minimum sentences, judge-only sentencing, adoption of the federal sentencing standards, and establishment of military sentencing standards. These arguments present provocative cases, but I believe the establishment of UCMJ-centric military sentencing guidelines, to be applied by judges only, is the best option to address sentence disparity because it relieves the administrative burden of keeping military panels for the sentencing phase and aligns the military criminal justice system more closely to the federal procedures, while retaining a distinct military process that fits the unique nature of military service. After an overview of the current federal and military sentencing procedures and the problems within, I will critically analyze the pros and cons of each argument and present my own experiences in the court-martial sentencing process to support my argument.

Federal Sentencing Procedures and Guidelines

The current federal sentencing system was shaped most significantly by the Sentencing Reform Act of 1984, which was enacted in response to a "wide disparity in sentences imposed for similar criminal offenses committed by similar offenders"¹. The act also created the United States Sentencing Commission and charged it with the hefty task of reforming federal sentencing to facilitate fair sentencing. The three goals of the bipartisan commission were to 1) enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system; 2) achieve reasonable uniformity in sentencing; and 3) gain proportionality in sentencing through appropriately different sentences for crimes of differing severity.²

The commission took two and a half years to develop the first set of federal sentencing guidelines. Its efforts included reading and listening to over 1,200 written and oral testimonies from judges and other interested parties as well as reviewing 10,000 criminal cases to establish sentencing ranges for offenses.³ Prior to developing the sentencing tables, the committee also deliberated and agreed upon four basic purposes of criminal punishment; deterrence, incapacitation, just punishment, and rehabilitation.⁴ These are almost identical to the five military sentencing goals, leaving out only the unique military goal of good order and discipline.

The first guidelines were finally published in 1987. Figure 1 below is the top portion of the current sentencing table.⁵ I added the blue boxes with notes to give you an idea of the complexity involved in determining a sentence. Also, the entire 2013 Guidelines Manual is 590 pages. Unlike the military justice system, jury members serving on federal court cases are released after the verdict is read and the judge alone determines the sentence, which is probably best considering the complexity involved in applying the guidelines.

SENTENCING TABLE							
(in months of imprisonment)							
Offense Level	Criminal History Category (Criminal History Points)						
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)	
1	0-6	0-6	0-6	0-6	0-6	0-6	
2	0-6	0-6	0-6	0-6	0-6	1-7	
3	0-6	0-6	0-6	0-6	2-8	3-9	
4	0-6	0-6	0-6	2-8	4-10	6-12	
5	0-6	0-6	1-7	4-10	6-12	9-15	
6	0-6	1-7	2-8	6-12	9-15	12-18	
7	0-6	2-8	4-10	8-14	12-18	15-21	
8	0-6	4-10	6-12	10-16	15-21	18-24	
9	4-10	6-12	8-14	12-18	18-24	21-27	
10	6-12	8-14	10-16	15-21	21-27	24-30	
11	8-14	10-16	12-18	18-24	24-30	27-33	
12	10-16	12-18	15-21	21-27	27-33	30-37	
13	12-18	15-21	18-24	24-30	30-37	33-41	
14	15-21	18-24	21-27	27-33	33-41	37-46	
15	18-24	21-27	24-30	30-37	37-46	41-51	
16	21-27	24-30	27-33	33-41	41-51	46-57	
17	24-30	27-33	30-37	37-46	46-57	51-63	
18	27-33	30-37	33-41	41-51	51-63	57-71	

Figure 1. United States Sentencing Commission Sentencing Table, 2013

The guidelines remained mandatory for almost 20 years until 2005, when the Supreme Court ruled in favor of the defendant in *United States v. Booker* (543 U.S. 220). Booker argued

that his Sixth Amendment right had been violated when a judge increased his sentence based on information the judge found during sentencing that was not admitted by the defense or found by the jury. The Supreme Court ruled that Booker's Sixth Amendment right had indeed been violated, overturned the sentence, and subsequently reduced the Federal Sentencing Guidelines to advisory.⁶

Despite the Supreme Court's ruling, the Sentencing Commission's 2006 report concluded that nearly 63% of judges dispensed sentences that conformed to the Guidelines Manual. However, the number of sentences within the guidelines has declined steadily; dropping over 10% over the past seven years. Also, the number of sentences below the guideline range has increased from 12% to 19% over the same timeframe.⁷

The sentencing guidelines are not immune to criticism. Some argue that the guidelines drive additional court proceedings such as appeals. This is evident in the increase of appeals from 3% to almost 65% in the 2 years following the Sentencing Reform Act.⁸ Other opponents of the guidelines claim they are too complicated and training provided on application of the guidelines is insufficient.⁹ The Sentencing Commission also recognized the need for effective training programs and implemented a robust training program. Since 1995, the Sentencing Commission has provided training to over 106,200 individuals.¹⁰ They also instituted a *HelpLine* to assist probation officers, judges, prosecutors, defense attorneys and law clerks with specific guideline questions. Since *HelpLine's* inception in 1987, the Commission staff has responded to over 28,000 questions on the guidelines.¹¹ The sheer volume of trainees and *HelpLine* questions from law-savvy individuals provides additional insight into the complexity of the guidelines.

The most vocal critics protest that the guidelines are too rigid and inflexible and make departure from the guidelines rare.¹² They claim that "justice in sentencing requires an

individualized assessment of the offender and the offense, leading to a moral judgment imposed by judges with skill, experience, and wisdom [instead of] judges mechanically evaluat[ing] defendants as inanimate objects or clumps of data.”¹³ However, as noted above, judges are using their discretion more and more as they sentence outside the guidelines.

Current Military Sentencing Procedures

Good order and discipline are especially critical to the military profession and service members are expected to be ready to deploy at a moment’s notice. Due to this unique nature of military service, military justice is distinctly different from the federal system. The sentencing authority (the person or panel determining the sentence in a case) is determined when the accused chooses the forum for the trial. Per Rule 903 of the MCM, the accused can choose to be tried by a court-martial (enlisted defendants can request a panel of at least one third enlisted members) or he/she can request to be tried and sentenced by military judge alone. A third option for the accused is to plead guilty in front of a military judge and then sentenced by a panel.¹⁴

After a conviction or guilty plea, lawyers on both sides have the opportunity to present information and witnesses to the sentencing authority “to aid the court-martial in determining an appropriate sentence.”¹⁵ The evidence presented is limited by Manual for Courts-Martial Rule 1001. The prosecution may present the following:

1. Data from charge sheet (accused’s pay, service, duration/nature of pretrial restraint)
2. Accused’s personal data such as marital status and number of dependents and character of prior service to include in disciplinary actions such as Article 15’s
3. Prior convictions of the accused in either military or civilian courts
4. Aggravating circumstances directly relating to or resulting from the convicted offenses (i.e. impact on victim, mission, or evidence to support the accused selected a victim based on race, color, religion, gender, sexual orientation)
5. Evidence of rehabilitative potential of the accused¹⁶

The defense is given a chance to rebut any information presented by the prosecution and can also introduce new information to explain extenuating or mitigating circumstances of the offense, such as honorable acts or traits to persuade the sentencing authority to be more lenient when selecting a punishment. The accused may also make a sworn or unsworn statement on his/her behalf. Although both statements can be rebutted by the prosecution, only the sworn statement is subject to cross-examination. Next, the prosecution and defense lawyers take turns presenting arguments for their version of an appropriate sentence (within the mandatory minimum or maximum sentence if applicable).

If the accused chose to be tried by a panel, there is one final step before sentence deliberation. The judge informs panel members that the five goals of sentencing are rehabilitation; punishment; protection of society; preservation of good order and discipline; and deterrence of the convict or others to commit similar offenses.¹⁷ The judge also instructs the members on the following:

1. Authorized maximum and minimum punishment
2. Effect any sentence may have on the accused's entitlements and pay
3. Procedures for deliberation and voting on the sentence
4. That they must not rely on the possibility of any mitigating action by the convening or higher authority
5. That they should consider all matters in extenuation, mitigation, and aggravation, whether introduced before or after findings¹⁸

Court members can ask questions on the procedures, but the judge may not give them information on the outcomes of similar offenses and court members may not research similar cases when deliberating a sentence.¹⁹ Once the judge's sentencing instruction is complete, court members are released for deliberation.

A Need for Change to Sentencing in the Military Justice System

To address sentence disparity, the Sentencing Reform Act of 1984 overhauled sentencing in federal courts, but the military has not followed suit...why? Is the military immune to sentence disparity? The answer is no. In 2000, a Marine Corps JAG, Major Steven Immel evaluated military sentencing data for each of the four services and concluded that sentence disparity did indeed exist, both within each service individually and between the services. For example, the overall average sentence of all the services for drug distribution deviated by over 30 months from the mean sentence with the Marine Corps having the most significant deviation internally of 56 months.²⁰ Immel asserts that sources of the military's sentencing disparity are its abandonment of uniformity of a sentencing goal in the 1950's, the wide discretion given to sentencing authorities, and the accused's option of sentencing by panel members or judge alone.²¹

There are several other philosophies on the cause of sentence disparity in military. One theory is that military members serving on a court-martial are not experienced enough to adjudge an appropriate sentence and, since they are not allowed to ask about or look into similar cases, they do not have a proper frame of reference prior to sentencing.²² I served as a court martial panel member for the first time as a lieutenant. Although I had only been in the military for a few years, had directly supervised a handful of Airmen, and was just beginning to grasp the true meaning of good order and discipline, a convening authority (who had never met me) thought I was up for the job.

After we found the defendant guilty, both lawyers presented information to be considered in sentencing, the defendant made an unsworn statement, and then both sides made their closing arguments. Both the prosecution and defense lawyers were intense. I tried not to be swayed by

the dramatics, but I can see how a young, inexperienced officer could be swayed by the stronger *arguer* instead of the stronger *argument*. After the judge gave us our sentencing instructions, we were released to deliberate the sentence. The task of finding an appropriate sentence was daunting without any helpful guidance such as sentences in similar cases. How does a lieutenant with only a few years in the military form an opinion on an appropriate sentence? It seemed like a shot in the dark and the anxiety I felt was overwhelming. Thinking back to that court-martial, I question the appropriateness of military panel members adjudging sentences.

Another criticism of military panel sentencing is the potential for unlawful command influence. Since court members fall under the chain of command of the convening authority, there is always a chance that general or specific comments made by the convening authority (even if made well before the court convenes) can sway a court member's opinion on an appropriate sentence. Undue influence can happen at a more strategic level as well. As recently as June 2014, the U.S. Navy-Marine Corps Court of Criminal Appeals overturned a Marine staff sergeant's 2012 sexual assault conviction on grounds of unlawful command influence by the Commandant of the Marine Corps, Jim Amos. The court found that 8 of the 11 members serving on the panel had attended a speaking engagement two months prior to the staff sergeant's trial where the Commandant essentially "dictat[ed] that the punishment should be dismissal from the service regardless of other mitigating factors."²³

Command influence is not the only dangerous persuasion in military panel sentencing. When I served on a court-martial, I was the lowest-ranking panel member and the rank in the deliberation room was a bit intimidating. Although, this group of higher-ranking officers did not treat me as an inferior, I can see how a young, inexperienced officer could feel pressure to side with the opinions of higher-ranking officers. We wear our uniforms in the deliberation room and

the rank is always visible. Respect and subordination to higher ranks is part of our military culture and 10 minutes of sentencing instructions from a judge may not be able to negate this.

Court member selection is flawed as well and I have had the opportunity to witness its imperfection during my four tours as an executive officer; twice at the group level, and twice at the wing level. The Uniform Code of Military Justice directs the convening authority to select panel members who are “best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.”²⁴ However, the call for court member nominations, along with “fair share” rank and numbers required, would flow quarterly from the legal office, through the wing and group executive officers to commanders. As the deployments and home-station operations tempo increased, I found it increasingly difficult to get commanders to fill their quotas. Also, as the group executive officer, I knew most of the officers in the group and I will assert that commanders did not usually nominate their best officers. They needed their best officers to remain in their units because they were vital to the mission. The individual they nominated may not have the “judicial temperament” required to sit on a court-martial, but he/she was the only lieutenant, captain, or major they could afford to give up for an extended amount of time. The other tactic employed by commanders was the rotating duty method. That is, some commanders nominate different officers each quarter to ensure they all have an opportunity to learn about the military justice system, regardless of their performance or conduct in the unit. Although I believe most commanders understand the importance of the military justice system, many were under pressure due to low manning, deployment taskings, or upcoming inspections.

Other complaints about court member sentencing are the potential for compromise verdicts (i.e., a jury member was not completely convinced on guilt and therefore advocates for a leaner sentence),²⁵ lack of evidentiary safeguards (measures to prevent a military panel member

from being influenced by testimony that provokes prejudice),²⁶ and the administrative burden of court member selection and employment as mentioned above. There are a number of potential solutions to address these concerns and the issue of sentence disparity.

Judge-Only Sentencing

One frequently debated solution to sentence disparity is to remove court members from the sentencing equation altogether. Advocates of judge-alone sentencing argue that court members are not capable of determining appropriate sentences because they have little experience in legal matters and thus, no frame of reference to make an informed decision.²⁷ As mentioned above, their inexperience with military justice cases can also make them more susceptible to persuasion and their sentences may be swayed by a stronger testimony by the defense or prosecution. Judges, however, are selected for their litigation experience and ability to remain objective so they are much more reliable to determine an appropriate sentence.²⁸

Another positive about judge-only sentencing is that it frees up the administrative burden of keeping members during the sentencing phase. As mentioned above, many units are struggling with low manning due to the high operations tempo. If court members are released after the verdict is read, they can return to their units to alleviate the burden of their absence. Some argue that the time spent of the sentencing phase is negligible, but I disagree. The number of court-martial convictions in Fiscal Year 2013 was 2,163 (1,073 general and 1,090 special courts-martial).²⁹ If you multiply convictions by the *minimum* number of panel members (five for general and three for special), you get over 8,600 military members. If the sentencing phase only lasted three hours, that would add up to almost 26,000 man-hours. If there are 12 members on each panel and still only five hours of sentencing, we would have diverted close to 130,000 man-hours from primary missions. Other arguments for judge-alone sentencing are there is less

chance of unlawful command influence as they are not in the convening authority's chain of command and evidentiary safeguards are not an issue because judges are experienced in objectivity and empowered to rule on the admissibility of evidence.³⁰

Those against judge-only sentencing argue that panel members who lack experience with similar cases are more open consider the uniqueness of each case, and therefore adjudge the most appropriate sentence. Further, they purport that the "deliberative, collective process [of a group of military members agreeing on the proper sentence] ensures that, whatever the sentence is, it is, by definition, appropriate."³¹ Other opponents of judge-alone sentencing assert that sentencing should be done by military members because they represent a sampling of the community.³² Neither of these two arguments presents an issue for federal sentencing and I do not believe the uniqueness of the military should require divergence from the federal courts in this aspect.

The final argument against judge-alone sentencing is that it deprives military officers of valuable training on the military legal process, but this weak argument is quickly rebutted because participation in the conviction phase of the court-martial should suffice to provide sufficient insight into the military justice system.³³

Mandatory Minimums

Some individuals advocate for additional mandatory minimums in lieu of complicated sentencing guidelines, claiming it is an easy fix to combat sentence disparity. Currently, the military currently has only two mandatory minimum sentences; spying (death) and murder (life imprisonment).³⁴ I believe mandatory minimums are too rigid to account for unique circumstances. For example, the federal system has established mandatory minimums for 192 offenses and about 32% of people receiving a mandatory minimum sentence had little or no criminal record.³⁵ Perhaps more persuasive is the case of Lee Wollard, a Florida man who, in

responding to cries for help from his daughter who was fighting with her 17-year-old “troubled teen” boyfriend. Wollard grabbed a gun and shot a warning shot through a wall to scare off the aggressor; these facts were undisputed in court. Although Wollard was a first-time offender and no one was physically injured, he was subject to the Florida mandatory minimum on 20 years for aggravated assault involving a firearm. Upon sentencing, the Judge stated to Wollard that he “would not be sentencing [him] to this term...if it were not for the fact that [he] was obligated under oath as a judge to do so.”³⁶

There are many cases like Wollard’s in which judges are prohibited from using their professional, experienced discretion to impose perhaps a more appropriate sentence in unique cases. Also, since mandatory minimums have a “limited number of aggravating factors to trigger the prescribed penalty without regard to the possibility that mitigating circumstances [may surround] the offense,” the Sentencing Commission continues to advise that strong guidelines provide more flexibility and serve as a better advocate in sentence consistency.³⁷

Adopting the Federal Guidelines vs Establishing Military Sentencing Guidelines

Two other suggested solutions to the military sentencing issue are to adopt the federal guidelines or to establish unique military sentencing guidelines. I reject the proposal for absolute adoption of the federal standards because the potential crimes are simply too different and do not lend themselves to the uniqueness of the military. For example, the federal guidelines encompass over 1,000 offenses, including crimes committed by corporations,³⁸ but the UCMJ addresses only 58 articles for individual offenses. The federal guidelines also do not address military-unique offenses such as desertion, disrespect toward superior commissioned officer and conduct unbecoming an officer and a gentleman.³⁹

Adopting unique military guidelines that are less complicated than the federal guidelines may be a better solution. Major Immel suggests an attractive model for these guidelines, incorporating each article of the UCMJ, broken down by classifications also specified in the UCMJ, in a sentencing table. He purposes that a military judge chooses the sentence category (i.e. egregiousness of the crime taking into account any mitigating, extenuating circumstances) and the military panel chooses the sentence.⁴⁰ Although I agree with the Immel's concept of a military sentencing table, I believe these guidelines should be applied by military judges only. Determining the egregiousness of a crime is best left in the hands of an experienced, objective judge and releasing court members prior to the sentencing phase could potentially save hundreds of thousands of man-hours each year. Ultimately, these guidelines will reduce sentence disparity by narrowing the options, but still allow the judge to use discretion in unique cases.

Conclusion

The military justice system is decades behind the federal courts in sentencing reform and changes must be instituted to address the issue of sentence disparity, which is caused by a combination of court member in-the-dark sentencing and judge sentencing without sufficient uniformity-driving guidelines in place. I believe that establishing UCMJ-centric sentencing guidelines that are less complex and less rigid than the federal guidelines will best serve this purpose by removing military panels lacking legal objectivity and sentencing experience from the process. This will also relieve the administrative burden of keeping military panels for the sentencing phase as they received valuable training on the military justice system during the trial. By instituting judge-only sentencing, the military justice system will be more in line with the federal system, while still accommodating the uniqueness of the military, and ultimately lead to more consistent sentencing and continued public confidence in the military justice system.

Endnotes

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 - ² USSC, *Guidelines Manual*, 2-3.
 - ³ Klotz, “Adoption of the Federal Sentencing Guidelines by Courts-Martial,” 10, 12.
 - ⁴ USSC, *Guidelines Manual*, 1.
 - ⁵ USSC, *Guidelines Manual*, 395.
 - ⁶ USSC, *Supreme Court Cases on Sentencing Issues*, 12.
 - ⁷ USSC, Annual Reports 2006-2013, Chapter 5-Research.
 - ⁸ Klotz, “Adoption of the Federal Sentencing Guidelines by Courts-Martial,” 17.
 - ⁹ Luna, “Misguided Guidelines: A Critique of Federal Sentencing,” 1.
 - ¹⁰ USSC, Annual Reports 1995-2013, Chapter 4-Guideline Training and Education.
 - ¹¹ USSC, Annual Reports 1995-2013, Chapter 5-Research.
 - ¹² Immel, “Development, Adoption, Implementation of Military Sentencing Guidelines.” 109.
 - ¹³ Luna, “Misguided Guidelines: A Critique of Federal Sentencing,” 1.
 - ¹⁴ Manual for Courts-Martial (MCM), Rule 903.
 - ¹⁵ MCM, Rule 1001.
 - ¹⁶ MCM, Rule 1001.
 - ¹⁷ Immel, “Development, Adoption, and Implementation of Military Sentencing Guidelines.” 26.
 - ¹⁸ MCM, Rule 1005.
 - ¹⁹ Schmid, “Military Justice Edition: This Court-Martial Hereby (Arbitrarily) Sentences You: Problems with Court Member Sentencing in the Military and Proposed Solutions,” 3.
 - ²⁰ Immel, “Development, Adoption, Implementation of Military Sentencing Guidelines.” 50-60.
 - ²¹ Immel, “Development, Adoption, Implementation of Military Sentencing Guidelines.” 60-61.
 - ²² Ehlenbeck, “Court-Martial Sentencing with Members: A Shot in the Dark,” 33.
 - ²³ Joyner, “More On Unlawful Command Influence.”
 - ²⁴ Title 10, UCMJ, Article 25(d)(2).
 - ²⁵ Schmid, “Problems with Court Member Sentencing in the Military and Proposed Solutions,” 4.
 - ²⁶ Schmid, “Problems with Court Member Sentencing in the Military and Proposed Solutions,” 5.
 - ²⁷ Ehlenbeck, “Court-Martial Sentencing with Members: A Shot in the Dark,” 33.
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 - ³⁰ Schmid, “Problems with Court Member Sentencing in the Military and Proposed Solutions,” 5.
 - ³¹ Thompson, Major Brian M., USAF. “Judge-Only Sentencing: Judicial Power Grab?” 13.
 - ³² Thompson, Major Brian M., USAF. “Judge-Only Sentencing: Judicial Power Grab?” 13.
 - ³³ Schmid, “Problems with Court Member Sentencing in the Military and Proposed Solutions,” 4.
 - ³⁴ MCM, Rule 106 and Rule 118.
 - ³⁵ USSC, *Report to Congress: Mandatory Minimum Penalties*, 125, A-20.
 - ³⁶ CBS News, “Mandatory minimum sentencing: Injustice served?”
 - ³⁷ USSC, *Report to Congress: Mandatory Minimum Penalties in Federal Criminal Justice*, 346.
 - ³⁸ Klotz, “Adoption of the Federal Sentencing Guidelines by Courts-Martial,” 51.
 - ³⁹ UCMJ, Art 885, Art 889, Art 933.
 - ⁴⁰ Immel, “Development, Adoption, Implementation of Military Sentencing Guidelines.” 69-84.

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